No. 18-6210

In the

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ of Certiorari to the
Supreme Court of Wisconsin

BRIEF OF THE RESPONDENT, STATE OF WISCONSIN

JOSHUA L. KAUL
Attorney General of Wisconsin

ANTHONY D. RUSSOMANNO
Counsel of Record
HANNAH S. JURSS
MICHAEL C. SANDERS
Assistant Attorneys General

Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703
(608) 267-2238
russomannoad@doj.state.wi.us

QUESTION PRESENTED

In a state with an implied-consent statute for intoxicated motorists, is a warrantless blood draw of an unconscious driver for whom police have probable cause of operating under the influence an unlawful search under the Fourth Amendment?

TABLE OF CONTENTS

QUESTION PRESENTED i

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 3

A. Legal background. 3

B. Background on impaired driving. 5

C. Factual background. 9

D. Procedural background 12

SUMMARY OF THE ARGUMENT 14

ARGUMENT 19

I. This Court has long upheld implied consent laws, like Wisconsin's, under the Fourth Amendment. 20

II. The implied consent law's application to an unconscious intoxicated driver is valid either as a consent search, or as a reasonable condition to combat intoxicated driving. 23

A. Through the implied consent law, Mitchell provided valid consent under the Fourth Amendment. 24

1. Voluntary consent may be inferred from context and does not require a knowing on-the-spot waiver. 25

2. The search of an unconscious impaired driver was valid under the consent exception. 31

3. The State is not constitutionally required to afford unconscious drivers the opportunity to withdraw consent. 33

4. The narrow consent inferred is reasonable, especially since the consent flows from the driver's own choices. 37

B. The search was reasonably imposed as a condition of driving on public roads to combat the intoxicated operation of motor vehicles. 43

1. Wisconsin has a compelling interest in obtaining blood evidence from unconscious persons who operated while intoxicated. 47

2. The unconscious driver presumption is narrowly tailored and minimally intrusive, especially under the circumstances..... 50

3. In addition, the blood draw was reasonable because Mitchell's proposed alternative — a warrant — imposes significant burdens while adding nothing meaningful for the suspect..... 52

III. Alternatively, drawing blood from an unconscious impaired driver is reasonable under *Birchfield* as a search incident to arrest..... 55

CONCLUSION..... 58

TABLE OF AUTHORITIES

Cases

Bailey v. State,
790 S.E.2d 98 (Ga. Ct. App. 2016) 36

Birchfield v. N. Dakota,
136 S. Ct. 2160 (2016) .....3, *passim*

Breithaupt v. Abram,
352 U.S. 432 (1957) 19, 21, 32–33

Byars v. State,
336 P.3d 939 (Nev. 2014) 40

Colonnade Catering Corp. v. United States,
397 U.S. 72 (1970) 45

Commonwealth v. Myers,
164 A.3d 1162 (Pa. 2018)..... 36

Cruzan v. Director, Missouri Department of Health,
497 U.S. 261 (1990) 42

Delaware v. Prouse,
440 U.S. 648 (1979) 51

Flonnory v. State,
109 A. 3d 1060 (Del. 2015) 30

Florida v. Jardines,
569 U.S. 1 (2013) 26, 29, 35

Florida v. Jimeno,
500 U.S. 248 (1991) 17, 24, 34, 44

Georgia v. Randolph,
547 U.S. 103 (2006) 34–35

Heien v. North Carolina,
135 S. Ct. 530 (2014) 57

Hess v. Pawloski,
274 U.S. 352 (1927) 47

Illinois v. Rodriguez,
110 S. Ct. 2793 (1990) 35

Jardines v. State,
73 So. 3d 34 (Fla. 2011) 35

Kentucky v. King,
563 U.S. 452 (2011) 23

Mackey v. Montrym,
443 U.S. 1 (1979) 48

Marshall v. Barlow's, Inc.,
436 U.S. 307 (1978) 26, 45

Maryland v. King,
569 U.S. 435 (2013) 45

McGann v. Ne. Ill. Reg'l Commuter R.R. Corp.,
8 F.3d 1174 (7th Cir. 1993) 25, 37

McGraw v. State,
245 So. 3d 760 (Fla. Dist. Ct. App. 2018) 31, 36

Mich. Dep't of State Police v. Sitz,
496 U.S. 444 (1990) 5, 45, 48

Missouri v. McNeely,
569 U.S. 141 (2013) 3, 15, 19–22

Morgan v. United States,
323 F.3d 776 (9th Cir. 2003) 25

Morrow v. State,
303 A.2d 633 (Del. 1973) 37

Nat'l Treasury Emps. Union v. Von Raab,
489 U.S. 656 (1989) 45

People v. Arrendondo,
199 Cal. Rptr. 3d 563
(Cal. Ct. App. 2016) 30, 36–37

People v. Hyde,
393 P.3d 962 (Colo. 2017) 31, 36

Rochin v. California,
342 U.S. 165 (1952) 32

S. Dakota v. Neville,
459 U.S. 553 (1983) 15–16, 21, 36

S. Dakota v. Opperman,
428 U.S. 364 (1976) 46

Samson v. California,
547 U.S. 843 (2006) 45

Schmerber v. California,
384 U.S. 757 (1966) 33

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) ..... 16, *passim*

State v. Banks,
434 P.3d 361 (Or. 2019) 30

State v. Brooks,
838 N.W.2d 563 (Minn. 2013) 30

State v. Butler,
302 P.3d 609 (Ariz. 2013) 30

State v. Dalton,
914 N.W.2d 120 (Wis. 2018) 34

State v. Dawes,
No. 111310, 2015 WL 5036690
(Kan. Ct. App. Aug. 21, 2015) 36

State v. Disch,
385 N.W.2d 140 (Wis. 1986) 5

State v. Fierro,
853 N.W.2d 235 (S.D. 2014) 40

State v. Halseth,
339 P.3d 368 (Idaho 2014) 40

State v. Havatone,
389 P.3d 1251 (Ariz. 2017) 37

State v. Houghton,
868 N.W.2d 143 (Wis. 2015) 57

State v. Modlin,
867 N.W.2d 609 (Neb. 2015) 30

State v. Pettitjohn,
899 N.W.2d 1 (Iowa 2017) 30

State v. Romano,
800 S.E.2d 644 (N.C. 2017) 36

State v. Ruiz,
545 S.W.3d 687 (Tex. App. 2018) 37

State v. Ryce,
368 P.3d 342 (Kan. 2016) 40

State v. Speelman,
102 N.E.3d 1185 (Ohio Ct. App. 2017) 32, 36, 53

State v. Tullberg,
857 N.W.2d 120 (Wis. 2014) 4

State v. Villarreal,
475 S.W.3d 784 (Tex. Crim. App. 2014) 40

State v. Yong Shik Won,
372 P.3d 1065 (Haw. 2015) 30

United States v. Biswell,
406 U.S. 311 (1972) 45, 46

United States v. Carloss,
818 F.3d 988 (10th Cir. 2016) 29

United States v. Drayton,
536 U.S. 194 (2002) 24

United States v. Ellis,
547 F.2d 863 (5th Cir. 1977) 25

United States v. Guerrero,
472 F.3d 784 (10th Cir. 2007) 26

United States v. Hartwell,
436 F.3d 174 (3rd Cir. 2006) 48

United States v. Hodson,
77 U.S. (1 Wall.) 395 (1870) 31

United States v. Jones,
701 F.3d 1300 (10th Cir. 2012) 25

United States v. Sanders,
424 F.3d 768 (8th Cir. 2005) 34

United States v. Walls,
225 F.3d 858 (7th Cir. 2000) 25

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995) 44

Winfield v. Mercy Hosp. & Med. Ctr.,
591 F. App'x 518 (7th Cir. 2015) 41

Winsley v. Cook Cty.,
563 F.3d 598 (7th Cir. 2009) 46

Wisconsin v. Zielke,
403 N.W.2d 427 (Wis. 1987) 5

Constitutional Provisions

U.S. Const. amend. IV 23

Statutes

42 U.S.C. § 1395cc(f)(3) 41

42 U.S.C. § 1396a(w)(4) 41

Wis. Stat. § 343.05(2) 27

Wis. Stat. § 343.05(3)(a) 30

Wis. Stat. § 343.07(1g) 30

Wis. Stat. § 343.301(1g)(a) 50

Wis. Stat. § 343.301(1g)(a)2.b. 38, 50

Wis. Stat. § 343.303 11

Wis. Stat. § 343.305(2) 1, 4, 16, 20, 22, 27

Wis. Stat. § 343.305(3)(a) 1, 4, 20, 22, 30

Wis. Stat. § 343.305(3)(b) 2, 5, 20, 31, 38–39

Wis. Stat. § 343.305(4) 2, 4, 13, 20

Wis. Stat. § 343.305(5)(b) 3, 5

Wis. Stat. § 343.305(10)(a) 5

Wis. Stat. § 346.63(1)(am) 50

Wis. Stat. § 346.63(1)(b) 38, 50

Wis. Stat. § 346.65(2)(g) 38, 50

Other Authorities

David Y. Nakashima, *Your Body, Your Choice: How Mandatory Advance Health-Care Directives are Necessary to Protect Your Fundamental Right to Accept or Refuse Medical* Treatment, 27 Harv. L. Rev. 201 (2004) 41

Donald J. Kochan, *Bubbles (or, Some Reflections on the Basic Laws of Human Relations)*, 26 Fordham Envtl. L. Rev. 133 (2015) 52

Garriott's Medicolegal Aspects of Alcohol, Yale H. Caplan & Bruce A. Goldberger, eds., 6th ed. (2015) 38, 43

Miguel F. P. de Figueiredo, *Throw Away the Key or Throw Away the Jail? The Effect of Punishment on Recidivism and Social Cost*, 47 Ariz. St. L.J. 1017 (2015) 47

Robert J. McManus, *Montana v. Egelhoff: Voluntary Intoxication, Morality, and the Constitution*, 46 Am. U. L. Rev. 1245 (1997) 39

S. Arthur Moore & Eelco F. Wijdicks, *The Acutely Comatose Patient: Clinical Approach and Diagnosis*, 33 Seminars in Neurology 110 (2013) 43

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Wisconsin Stat. § 343.305(2) provides, in relevant part: "(2) IMPLIED CONSENT. Any person who . . . operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(ar) or (b)."

Wisconsin Stat. § 343.305(3)(a) provides: "REQUESTED OR REQUIRED. (a) Upon arrest of a person for violation of s. 346.63(1), (2m) or (5) . . . a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample

does not bar a subsequent request for a different type of sample."

Wisconsin Stat. § 343.305(3)(b) provides: "A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated s. 346.63 (1), (2m) or (5) . . . one or more samples specified in par. (a) or (am) may be administered to the person."

Wisconsin Stat. § 343.305(4) provides: "INFORMATION. At the time that a chemical test specimen is requested under sub. (3) (a), (am), or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested:

'You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.

This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your

operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.'"

Wisconsin Stat. § 343.305(5)(b) provides: "Blood may be withdrawn from the person . . . only by a physician, registered nurse, medical technologist, physician assistant, phlebotomist, or other medical professional who is authorized to draw blood, or person acting under the direction of a physician."

STATEMENT OF THE CASE

A. Legal background.

"Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year." *Birchfield v. N. Dakota*, 136 S. Ct. 2160, 2166 (2016). Against that backdrop, "all 50 States have adopted implied consent laws." *Missouri v. McNeely*, 569 U.S. 141, 161 (2013) (plurality op.). Those laws are "legal tools" that States may use "to enforce their drunk-driving laws and to secure [blood alcohol concentration] BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 160–61.

Wisconsin's law, like other States', provides that "[a]ny person who . . . drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity . . . of alcohol [or] controlled substances" when requested by an officer with probable cause of driving under the influence. Wis. Stat. § 343.305(2), (3)(a).[1]

The officer reads a form (called Informing the Accused) that instructs the driver that submission to a test is being sought. The officer is required to inform a conscious person that, if the person submits and the analysis "shows more alcohol in [the person's] system than the law permits while driving," the person's operating privilege will be suspended and the results may be used in court. Wis. Stat. § 343.305(4). If the driver refuses to submit, then that comes with consequences: "[i]f you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties." A refusal also may be used against the person in court. Wis. Stat. § 343.305(4).

---

[1] The Wisconsin Supreme Court has concluded that an arrest is not required for an officer to request a sample under Wisconsin's implied consent law. An officer may request a sample if there is probable cause that the person has operated a motor vehicle while under the influence of an intoxicant. *State v. Tullberg*, 857 N.W.2d 120, 135 (Wis. 2014).

This Court, in *Birchfield*, explained that the penalties for refusing a blood test may not include criminal ones but may include "civil penalties and evidentiary consequences on motorists who refuse to comply." 136 S. Ct. at 2165. Wisconsin's law conforms to that limit. *See Wisconsin v. Zielke*, 403 N.W.2d 427, 431 (Wis. 1987); Wis. Stat. § 343.305(10)(a).

The issue here concerns instances where the Informing-the-Accused interaction is not possible because the driver is unconscious. Wisconsin law provides that, when the intoxicated driver is "unconscious or otherwise not capable of withdrawing consent," he "is presumed not to have withdrawn consent." Wis. Stat. § 343.305(3)(b).[2] An officer with probable cause may proceed to administer the taking of a sample through a "medical professional." Wis. Stat. § 343.305(3)(b), (5)(b).

B. Background on impaired driving.

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). In a given year, drunk

---

[2] In Wisconsin, "[t]he word 'unconscious' is used to describe a person who is insensible, incapable of responding to sensory stimuli, or in a state lacking conscious awareness." *State v. Disch*, 385 N.W.2d 140, 144 (Wis. 1986). The Wisconsin Supreme Court has explained that "'not capable of withdrawing consent' must be construed narrowly and applied infrequently." *Id.*

driving takes 10,000 lives, or more, in the United States; that is about one death every 48 minutes.[3]

Like the rest of the country, Wisconsin feels its effect. For example, between 2003 and 2012, 2,577 people died in Wisconsin crashes involving a drunk driver, and fatality rates for all age groups exceeded the national average. The percentage of adults in Wisconsin who report intoxicated driving—3.1 percent—exceeded the national rate of 1.9 percent.[4] The harms continue: on average, there were about 200 alcohol-related fatalities in Wisconsin yearly between 2011 and 2015, and an average of 2,800 alcohol-related injuries each year.[5]

On top of this, drugged driving is on the rise. The country is suffering from an opioid epidemic and emergency room visits have risen dramatically due to

---

[3] *Drunk Driving*, U.S. Dep't of Transp., https://www.nhtsa.gov/risky-driving/drunk-driving (last visited Mar. 25, 2019); Nat'l Highway Traffic Safety Admin., *2007 Traffic Safety Annual Assessment – Alcohol-Impaired Driving Fatalities 1, Traffic Safety Facts: Research Note* (Dec. 2008), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811016.

[4] Ctrs. for Disease Control & Prevention, *Sobering Facts: Drunk Driving in Wisconsin* (Dec. 2014), https://www.cdc.gov/motorvehiclesafety/pdf/impaired_driving/drunk_driving_in_wi.pdf.

[5] *Final year-end crash statistics*, State of Wis. Dep't of Transp., https://wisconsindot.gov/Pages/about-wisdot/newsroom/statistics/final.aspx (last visited Mar. 25, 2019).

opioid overdoses.[6] And that is not the only drug that poses a threat. One recent study found "a large increase" in drugged driving, with "nearly one in four drivers test[ing] positive for at least one drug that could affect safety."[7] According to the Governors Highway Safety Association, from 2006 to 2016, the number of fatally-injured drivers who tested positive for drugs rose from 27.8% to 43.6%; of those fatally-injured drivers tested in 2016, 38% were positive for some form of marijuana, 16% for opioids, and 4% for both.[8]

It is documented that drugged and drunk drivers lose consciousness. For example, it takes only a quick search to find incidents like this recent one in Wisconsin: "the impaired motorist left a path of destruction in his wake. Officers found [the motorist] slumped over the wheel of his girlfriend's car around

---

[6] Jacqueline Howard, *ER visits for opioid overdose up 30%, CDC study finds*, CNN (Mar. 6, 2018, 1:29 p.m.) https://www.cnn.com/2018/03/06/health/opioid-overdose-emergency-departments-cdc-study/index.html.

[7] Press Release, Nat'l Highway Traffic Safety Admin., NHTSA Releases Two New Studies on Impaired Driving on U.S. Roads (Feb. 6, 2015), https://one.nhtsa.gov/About-NHTSA/Press-Releases/nhtsa_releases_2_impaired_driving_studies_02_2015.

[8] Governors Highway Safety Ass'n, *Drug-Impaired Driving*, 7, 12 (May 2018), https://www.ghsa.org/sites/default/files/2018-05/GHSA_DrugImpairedDriving_FINAL.pdf.

3:50 a.m."[9] The available data shows that drunk drivers cited in Wisconsin have a "median alcohol concentration" of 0.16%.[10] According to the National Institutes of Health, a 0.16% blood alcohol concentration begins the range of "severe impairment" (between a ".16–.30%" blood alcohol concentration). One symptom for that range of impairment is "[l]oss of consciousness."[11]

Overdoses on opioids "lead to unconsciousness," too.[12] As Outagamie County, Wisconsin, officials recently reported, "We have . . . had numerous incidents in which officers responded to drug users (who were) unconscious in their vehicles after using drugs."[13] Here is a sampling of recent headlines about drugged unconscious drivers in Wisconsin: "Richfield

---

[9] *Police Incident Reports*, City of Madison Police Dep't (Mar. 30, 2018, 9:49 a.m.), http://www.cityofmadison.com/police/newsroom/incidentreports/incident.cfm?id=20657.

[10] *Drunk driving arrests and convictions*, State of Wis. Dep't of Transp., https://wisconsindot.gov/Pages/safety/education/drunk-drv/ddarrests.aspx (last visited Mar. 25, 2019) (data for 2015).

[11] Nat'l Inst. On Alcohol Abuse, *Understanding the Dangers of Alcohol Overdose* (Oct. 2018), https://pubs.niaaa.nih.gov/publications/alcoholoverdosefactsheet/overdoseFact.pdf.

[12] *Opioid addiction*, U.S. Nat'l Library of Med. (Mar. 19, 2019), https://ghr.nlm.nih.gov/condition/opioid-addiction.

[13] Andy Thompson, *Drunk Driving Has Taken a Heavy Toll in Wisconsin. Now, Drugged Driving Is Gaining a Foothold*, Post Crescent (Appleton), (Sept. 3, 2018), https://www.postcrescent.com/story/news/2018/09/03/under-influence-drugged-drivers-rise-fox-valley-beyond/1142828002/.

man on opioids crashes car at Radisson Hotel"; "Unconscious man drives through neighborhood lawns after using heroin"; "Unconscious driver on I-43 overdosed on heroin"; and "Driver overdoses on heroin in van at rural Stoughton intersection," to cite a few.[14]

C. Factual background.

In May 2013, the Sheboygan County, Wisconsin, police received a call at 3:17 p.m. reporting concerning behavior by Gerald P. Mitchell. J.A. 100. Officer Alex Jaeger responded and spoke to Mitchell's neighbor, Alvin Swenson. J.A. 100. Swenson reported observing Mitchell as apparently "intoxicated or under the influence," and acting "very disoriented" and "stumbling." J.A. 101. This culminated in Mitchell

---

[14] Adriana Ramirez, *Richfield Man On Opioids Crashes Car at Radisson Hotel in Menomonee Falls*, Milwaukee J. Sentinel, (Aug. 8, 2018), https://www.jsonline.com/story/communities/northwest/crime/police-reports/2018/08/08/richfield-man-crashes-car-radisson-hotel-menomonee-falls/929580002/; *Unconscious man drives through neighborhood lawns after using heroin*, WMTV, (Jan. 2, 2019, 8:02 p.m.), https://www.nbc15.com/content/news/MPD-Unconscious-man-drives-through-neighborhood-lawns-after-using-heroin-503826041.html; *Police: Unconscious driver on I-43 overdosed on heroin*, WTMJ-TV, (last updated Mar. 23, 2018, 3:35 p.m.), https://www.tmj4.com/news/local-news/police-unconscious-driver-on-i-43-overdosed-on-heroin; *Driver overdoses on heroin in van at rural Stoughton intersection*, Channel 3000, (last updated Nov. 14, 2016, 1:42 a.m.), https://www.channel3000.com/news/local-news/driver-overdoses-on-heroin-in-van-at-rural-stoughton-intersection/155993931.

"nearly falling several times before getting into a gray minivan and driving away." J.A. 101.

About one-half hour later, the police found Mitchell. J.A. 103. Officer Jaeger again responded and observed that Mitchell's condition was consistent with what Swenson described. J.A. 105. "He was slurring his words. He had great difficulty in maintaining balance, nearly fell several times"; he required the help of officers to stay upright. J.A. 105. He also was shirtless, wet, and covered in sand. J.A. 105. Officer Jaeger further observed that Mitchell smelled strongly of intoxicants, and he was belligerent. J.A. 209. Another officer located Mitchell's minivan and found that it had minor, apparently fresh, damage. J.A. 107. And Officer Jaeger learned that Mitchell had prior convictions for operating while intoxicated. J.A. 106. Mitchell admitted to drinking both at his apartment and at the beach. J.A. 106. He said he parked his vehicle because he had been too drunk to drive. J.A. 106.

Officer Jaeger did not have Mitchell perform field sobriety tests because it would have been unsafe: Mitchell "could barely stand without being held." J.A. 107. He administered a preliminary breath test, which indicated a blood alcohol concentration of

0.24%.[15] J.A. 107–08. He arrested Mitchell for operating while intoxicated at 4:26 p.m. and put him in a squad car for transportation to police headquarters. J.A. 108–09, 113.

On the way to the police station, Mitchell's condition began declining, and he became more lethargic. J.A. 109–10. He had to be helped out of the squad car. J.A. 110. When Officer Jaeger placed Mitchell in a holding cell, Mitchell began to close his eyes and "sort of fall asleep or perhaps pass out," but would wake up with stimulation. J.A. 110.

In light of Mitchell's condition, Officer Jaeger concluded that an evidentiary breath test would be inappropriate, and he transported Mitchell to the hospital. J.A. 110. During the approximately eight-minute trip, Mitchell became "completely incapacitated" and would not wake up even when stimulation was applied (like shaking his arms or hands). J.A. 110. He was escorted into the hospital by wheelchair, where he then slumped over unable to lift himself. J.A. 111.

Officer Jaeger read the Informing the Accused form to Mitchell and requested a blood sample for evidentiary testing. J.A. 111–12. However, Mitchell

---

[15] A preliminary breath test (PBT) is not an evidentiary test. It is a screening device that officers use to help determine whether to arrest a driver for operating a motor vehicle while under the influence of an intoxicant or with a prohibited alcohol concentration. Wis. Stat. § 343.303. Refusal to submit to a request for a PBT carries no consequences.

"was so incapacitated he could not answer." J.A. 112. A phlebotomist then obtained a blood sample from him at 5:59 p.m. J.A. 119–20. The test revealed a blood alcohol concentration of 0.222%. J.A. 220.

Officer Jaeger recalled that, as he waited for the phlebotomist to draw blood, "medical efforts were being attempted" and Mitchell was being monitored by hospital staff. J.A. 115, 119–20. Mitchell "couldn't answer any hospital staff," and he "did not awake[n] while they placed catheters or any other type of medical instruments on him." J.A. 115. Mitchell eventually was admitted to the hospital's intensive care unit. J.A. 128.

D. Procedural background.

The State charged Mitchell with seventh-offense operating a motor vehicle while under the influence of an intoxicant and seventh-offense operating a motor vehicle while having a prohibited alcohol concentration, as Mitchell had six prior operating while intoxicated convictions. R. 1; 14.

Mitchell moved to suppress the blood test results on the ground that his blood was improperly drawn without a warrant. R. 23. The trial court denied the motion. J.A. 137–40. A jury found Mitchell guilty, and he was sentenced to three years of initial confinement and three years of extended supervision. R. 52; 53; 65.

Mitchell appealed. R. 77. The Wisconsin Court of Appeals certified the case to the Wisconsin Supreme Court to decide "whether the warrantless blood draw

of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment." J.A. 61. The Wisconsin Supreme Court then affirmed Mitchell's conviction in a fractured opinion. J.A. 8–60.

The lead opinion concluded that Mitchell had "voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication." J.A. 10, 37. "[T]hrough drinking to the point of unconsciousness," that opinion explained, Mitchell forfeited his statutory opportunity under Wis. Stat. § 343.305(4) to withdraw his consent. J.A. 10, 37. It concluded that this mechanism was reasonable under the Fourth Amendment. J.A. 34.

The concurring opinion upheld the warrantless blood draw but on different grounds. Citing a confluence of circumstances—including unconsciousness, drunk driving, the "evanescent evidence," and "no less intrusive means"—the opinion concluded that the blood draw "on an unconscious individual who has been arrested for operating a motor vehicle while intoxicated . . . is reasonable within the meaning of the Fourth Amendment." J.A. 44–45.

A two-justice dissent concluded that "[c]onsent provided solely by way of an implied consent statute is constitutionally untenable," and found no other basis to support the search. J.A. 51.

Mitchell petitioned this Court for a writ of certiorari on the issue of "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth amendment warrant requirement."

SUMMARY OF THE ARGUMENT

Drunk and drugged driving is an enormous public safety problem, and it is pernicious in Wisconsin. Yet it is everywhere; it takes a terrible national toll. The States must have tools to combat it, and every State does: implied consent. That implied consent makes a great deal of sense in the impaired driving context, where suspects often are, at a minimum, incoherent at the time police encounter them—indeed, at times, they are unconscious.

Wisconsin's implied consent statute is precisely the type of law that this Court has repeatedly endorsed, and upon which it has said that it casts no doubt. Mitchell, too, casts no doubt on implied consent, generally. Rather, he challenges a particular proviso, one that targets only a subset of drugged and drunk drivers: those that render themselves unconscious through intoxication or involvement in an impaired-driving crash. In other words, the law targets the most alarming and dangerous subset of all. This is not the time for the Court to deviate from its traditional support of implying consent for drunk and drugged drivers.

I. This Court has long recognized the validity of implied consent laws under the Fourth Amendment. It has not just upheld them but has endorsed them as valuable "legal tools to enforce [States'] drunk-driving laws." *McNeely*, 569 U.S. at 160 (plurality op.).

States may impose implied consent laws that "declare[ ] that any person operating a vehicle . . . is deemed to have consented to a chemical test of the alcoholic content of his blood if arrested for driving while intoxicated." *S. Dakota v. Neville*, 459 U.S. 553, 559 (1983). In *McNeely*, the Court approved of implied consent laws as an important "tool" and an alternative to nonconsensual blood draws. 569 U.S. at 160–61 (plurality op.). In *Birchfield*, the Court reaffirmed the laws' general validity, only recognizing a limit on what penalties may flow from a refusal: "It is another matter . . . for a State . . . to impose criminal penalties on the refusal to submit to such a test." 136 S. Ct. at 2185. The Court made clear that "nothing we say here should be read to cast doubt on" implied consent impaired driving laws more generally. *Id.*

Wisconsin's implied consent statute is valid under *Neville*, *McNeely*, and *Birchfield*, as it deems a driver to have consented to a blood draw if there is probable cause that he drove while impaired. If the driver refuses to submit and withdraws his consent, his operating privilege may be revoked, but there are no criminal penalties. That is what *Birchfield* allows.

II. Mitchell does not challenge implied consent impaired driving laws, generally. Rather, he believes that the traditional approval of those laws should not encompass the impaired driver who is unconscious. The Court should reject that view. Implied consent applies equally to the unconscious driver: he already has consented to the search. Further, even if consent were not conclusive, this Court should uphold the search as a reasonable and limited condition that comes with the privilege of driving.

A. Consent is favored, and a "search authorized by consent is wholly valid." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). It is not a rigid concept. For example, consent need not be verbalized and may occur through actions. It may be inferred.

The Court has approved of implied consent intoxicated driving laws. Those laws, on their faces, provide that a person consents to a search. They provide "consent to . . . tests." Wis. Stat. § 343.305(2). This Court has recognized that states may "declare[ ] that any person operating a vehicle . . . is deemed to have consented to a chemical test of the alcoholic content of his blood if arrested for driving while intoxicated." *Neville*, 459 U.S. at 559. It continues to recognize that this is inferred consent. As the Court reaffirmed in *Birchfield*, when discussing implied consent, "sometimes consent to a search need not be express but may be fairly inferred from context." 136 S. Ct. at 2185. That statement referenced with approval consent inferred both from conduct and from

a choice to participate in a specially restricted activity.

Becoming unconscious changes nothing about that consent analysis. The unconscious intoxicated motorist already has impliedly consented. He may, either before becoming unconscious or if he awakens, withdraw his consent. But the Constitution does not require a State to afford the opportunity for him to withdraw it.

Continuing to imply consent in these circumstances makes especially good sense because the law is narrowly targeted. It allows police to take evidence of intoxication only, and only from an intoxicated unconscious motorist who has created the dangerous situation. Holding otherwise would grant a motorist intoxicated to the point of unconsciousness greater rights. That should not follow, especially since the implied consent flows directly from that driver's own choices.

B. While this Court should hold that Mitchell's blood draw was valid because he consented, that is not the only path. "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

As Mitchell recognizes, the search may be valid if it is a reasonably imposed "condition of accepting certain government benefits." Pet'r's Br. 37. Indeed, there is a tradition of upholding searches where, as here, it is a narrow condition on a public privilege or

participation in a highly-regulated field. This case presents an intersection of those justifications. The search concerns not only the highly-regulated act of driving but also the heavily-scrutinized area of intoxicants.

Under the reasonableness test, this Court weighs the promotion of legitimate governmental interests against the degree to which the search intrudes upon an individual's privacy. There should be no serious question how that balance tips here. Everyone agrees that drunk and drugged driving gives rise to a weighty government interest in combating it. And the unconscious intoxicated driver is an especially dangerous subset. Further, drug-impaired driving is on the rise, putting a growing set of opioid-addicted drivers on the road. The States need their "tools" to combat both the existing and growing problem.

There is little to put on the other side of the balance because a blood draw, in these circumstances, adds little intrusion, if any. An unconscious drunk or drugged driver likely will have his blood drawn by medical professionals, no matter what. Further, he will sense none of it.

Mitchell's view that a warrant must issue does not grapple with those realities, or with what use a warrant truly would serve. Probable cause in these scenarios will not be subject to serious dispute, and the warrants will be identical in scope. On the other hand, requiring the steps needed to obtain a warrant poses real concerns. Police likely will need time to

assess the unconscious driver's state and any injuries to others, and to secure the scene. Delay means evidence is disappearing and, in these cases, any time lost may lead to serious medical consequences for the unconscious driver. An officer should be able to focus on that, and not on obtaining a warrant that will serve no demonstrable purpose.

The balance strongly favors the reasonableness of the narrow condition imposed here.

III. Lastly, this case provides an opportunity for the Court to revisit *Birchfield*'s search incident to arrest analysis in the context of an unconscious driver. There, in dicta, the Court commented that an unconscious intoxicated driver could not have his blood drawn incident to arrest. Now that the Court is faced with an unconscious driver, it should conclude otherwise. The key reasons that this Court gave for distinguishing a breath test from a blood test for the *conscious* driver would not apply here.

ARGUMENT

This Court has long recognized the problem of drunk and drugged driving in the United States. Intoxication causes "slaughter on our highways." *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957). That was true in 1957 and remains true today. It continues "to exact a terrible toll on our society," *McNeely*, 569 U.S. at 160 (plurality op.), and "a grisly toll on the Nation's roads." *Birchfield*, 136 S. Ct. at 2166.

Every State seeks to combat this. Each has, like Wisconsin, enacted laws prohibiting the operation of a motor vehicle by a person under the influence of alcohol or drugs. Important to those laws is implied consent. The implied consent statutes are "legal tools to enforce [States'] drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 569 U.S. at 160–61 (plurality op.). When the statute's conditions are met, a person driving on a public highway is deemed to have given consent to provide a sample of his blood, but only if there is probable cause that he operated under the influence. Wis. Stat. § 343.305(2), (3)(a). If the person refuses, his operating privilege is revoked and the refusal may be used in court. Wis. Stat § 343.305(4).

None of that is questioned here, and for good reason. This Court has confirmed the validity of the implied consent mechanism. The question here is what difference it should make that the consent may apply to an *unconscious* intoxicated motorist; he "is presumed not to have withdrawn consent." Wis. Stat. § 343.305(3)(b). Wisconsin submits that adding unconsciousness into the equation should make no difference.

I. This Court has long upheld implied consent laws, like Wisconsin's, under the Fourth Amendment.

The Court has approved of drunk driving implied consent laws, like Wisconsin's, for decades. Implied consent laws have existed since at least 1949.

See Breithaupt, 352 U.S. at 435 n.2. Today, all 50 states have them. *Birchfield*, 136 S. Ct. at 2169; *McNeely*, 569 U.S. at 161 (plurality op.).

The Court recognizes that States may impose implied consent laws that, for example, "declare[ ] that any person operating a vehicle . . . is deemed to have consented to a chemical test of the alcoholic content of his blood if arrested for driving while intoxicated." *Neville*, 459 U.S. at 559. While this Court's decisions have recognized a limit—a State may not criminalize withdrawing consent for a blood sample—it has not disavowed the concept of implied consent. Far from it.

In *McNeely*, the Court ratified implied consent laws as an alternative to nonconsensual blood draws. *McNeely* first considered whether a blood draw was justified as a *per se* exigency, and concluded it was not. *McNeely*, 569 U.S. at 165. That holding did not implicate consent because McNeely had withdrawn his: "McNeely . . . refused." *Id.* at 146.

McNeely did not just leave implied consent intact; it endorsed it. The Court recognized that the implied consent regime served to fill the gap that nonconsensual blood draws did not. "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 160–61 (plurality op.). The specific tool was implied consent: "all 50 States have adopted implied consent laws that require motorists,

as a condition of operating a motor vehicle within the State, to consent to BAC testing." *Id.* at 161.

In *Birchfield*, this Court reaffirmed the general concept of implied consent in impaired driving laws. The opinion reflects that a state may "deem[ ]" a person "to have consented," in the first instance. 136 S. Ct. at 2185. The Court was concerned with criminal consequences flowing from withdrawal of that consent: "It is another matter, however, for a State *not only* to insist upon an intrusive blood test, *but also* to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* (emphasis added). These statements reflect a limit on the consequences that may flow from a refusal to submit, but properly recognize that, absent that refusal, the motorist has impliedly consented.

Wisconsin's implied consent statute is valid under *Neville*, *McNeely*, and *Birchfield*. The law deems a person to have consented to a blood draw if there is probable cause that he operated a motor vehicle while under the influence of an intoxicant and the officer requests a sample. Wis. Stat. § 343.305(2), (3)(a). That officer need not ask the person for consent because it already is implied. *Birchfield*, 136 S. Ct. at 2185. If the driver refuses to submit and withdraws his consent, his operating privilege may be revoked. *Id.* But Wisconsin's law imposes no criminal penalties.

This is the type of regime that the Court has approved, most recently in *Birchfield*. A state law may deem an intoxicated driver to have impliedly consented to a blood draw, so long as refusal to submit is not a criminal offense. *Birchfield*, 136 S. Ct. at 2185.

II. The implied consent law's application to an unconscious intoxicated driver is valid either as a consent search, or as a reasonable condition to combat intoxicated driving.

Mitchell does not seek to challenge the statutory implied consent mechanism as it applies to a conscious driver. However, he believes the Fourth Amendment is offended when that driver loses consciousness. It is not. Drinking to the point of unconsciousness should not augment one's rights. It is entirely reasonable to continue to imply consent for those who have rendered themselves unconscious through drinking—indeed, they are the most dangerous drivers.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It further provides that warrants shall not issue without probable cause, but "does not specify when a search warrant must be obtained." *Birchfield*, 136 S. Ct. at 2173 (quoting *Kentucky v. King*, 563 U.S. 452, 459 (2011)). This Court "has inferred that a warrant must usually be secured." *Id.* (quoting *King*, 563 U.S. at 459).

There are prominent exceptions to that rule, two of which are applicable here. The Fourth Amendment was not offended because, *first*, Mitchell's search was done pursuant to consent and, *second*, it was a reasonable condition of driving on the public roads to combat the dangers of impaired driving. For either reason, the search should be upheld.

A. Through the implied consent law, Mitchell provided valid consent under the Fourth Amendment.

Fourth Amendment jurisprudence favors consensual searches, and this Court has long held that consent may take various forms. The consent exception flows from the Fourth Amendment's touchstone—reasonableness. "[I]t is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Jimeno*, 500 U.S. at 250–51.

The Court has recognized the value of consent in Fourth Amendment encounters. In "a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *United States v. Drayton*, 536 U.S. 194, 207 (2002). Thus, the "community has a real interest in encouraging consent." *Schneckloth*, 412 U.S. at 243. It sometimes "may yield necessary evidence for the solution and prosecution of crime," and sometimes may ensure that "a wholly innocent person is not wrongly charged with a criminal offense." *Id.* Overall, the avenue of consent "may result in considerably less

inconvenience for the subject of the search." *Id.* at 228.

1. Voluntary consent may be inferred from context and does not require a knowing on-the-spot waiver.

For consent to pass muster, it must be "voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248. Voluntariness shall be determined from "all the circumstances." *Id.* at 248–49. Those circumstances may allow consent to be inferred.

For example, in *United States v. Ellis*, the Fifth Circuit held that the defendant gave voluntary implied consent to a search of his car on a naval air station. 547 F.2d 863, 865–66 (5th Cir. 1977). He consented by his issuance, acceptance, and display of a visitor's pass on his car, where the pass acknowledged a right to search the car. *Id.*; *see also Morgan v. United States*, 323 F.3d 776, 782 (9th Cir. 2003) (recognizing implied consent to searches on military bases); *McGann*, 8 F.3d at 1183 (a person's notice that certain conduct would subject him to search is one of multiple factors demonstrating implied consent).[16]

---

[16] There are many other examples of consent being inferred. *E.g. United States v. Walls*, 225 F.3d 858, 863 (7th Cir. 2000) ("It is well established that consent may be manifested in a non-verbal as well as a verbal manner and her action in opening the door and stepping back to allow the entry was sufficient to convey her consent in these circumstances." (citation omitted)); *United States v. Jones*, 701 F.3d 1300, 1319–21 (10th Cir. 2012)

That kind of consent already has been recognized in the impaired driving setting. In the context of implied consent laws, the Court has reiterated that "[i]t is well established that a search is reasonable when a person consents," and that "sometimes consent to a search need not be express but may be fairly inferred from context." *Birchfield*, 136 S. Ct. at 2185 (citing *Florida v. Jardines*, 569 U.S. 1 (2013); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)). In that context, the Court cited as illustrative *Barlow's* discussion of certain highly-regulated industries, including the liquor industry, in which a participant "in effect *consents* to the restrictions placed upon him." 436 U.S. at 313 (emphasis added) (citation omitted).[17]

(holding defendant impliedly consented to police entry into his home where police officer told defendant, "I'm here for your marijuana plants" and asked to search his house, and where the defendant turned and walked toward the door of his home and police followed); *United States v. Guerrero*, 472 F.3d 784, 786, 790 (10th Cir. 2007) (explaining that a "palms up" hand gesture, in response to a request for consent to search a car, may constitute implied consent to search).

[17] Mitchell asserts that *Barlow's* provides no support for consent here, Pet'r's Br. 27–28, but he ignores this Court's statement in *Birchfield* that cites it for just that. *Birchfield*, 136 S. Ct. at 2185. *Barlow's* suggested only that consent would not flow from a statute that applies indiscriminately to businesses, but it distinguished areas that are traditionally subject to special oversight, like the liquor industry. *Barlow's*, 436 U.S. at 313–14. Further, as discussed below, *Barlow's* also lends support for a separate point—that the search was a reasonable condition on driving to combat operating while intoxicated.

In all, invoking *McNeely*, the *Birchfield* Court reaffirmed "the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. at 2185. It made clear that "nothing we say here should be read to cast doubt on" implied consent statutes. *Id.*

Mitchell attempts to recast implied consent laws as something else: he says they merely seek "to create conditions that encourage consent." Pet'r's Br. 17. However, that ignores both what the laws actually provide—they provide "consent to . . . tests"—and what this Court has stated—the laws are a version of consent "inferred from context." Wis. Stat. § 343.05(2); *Birchfield*, 136 S. Ct. at 2185.

Mitchell points out that Wisconsin's statute provides for an exchange between law enforcement and conscious drivers to ask whether they will submit to testing or potentially lose their operating privilege. In so doing, he misapprehends the purpose of that exchange. It is not to seek consent—that already happened—but rather to administer a test, with certain penalties at risk if the driver refuses to submit. It establishes the factual basis for the imposition of "civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. at 2185. But its function is not to secure the consent of the driver to a blood test.

Indeed, voluntary consent does not require a knowing waiver of rights at the time of the search. *Schneckloth*, 412 U.S. at 232–33. In *Schneckloth*, following a traffic stop, a police officer asked an occupant if he could search the car, and the man agreed. *Id.* at 220–22. Nothing in the record established that the man knew he could refuse consent. *Id.* at 221–22. The Ninth Circuit concluded that this mattered, but this Court disagreed.

Fourth Amendment consent is not akin to the waiver of trial rights, which, unlike consent, requires intelligent waiver. "Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures." *Schneckloth*, 412 U.S. at 241. The Fourth Amendment "is not an adjunct to the ascertainment of truth"; it concerns the value our society places on the "right of each individual to be let alone." *Id.* at 242. There thus "is nothing constitutionally suspect in a person's voluntarily allowing a search," regardless of whether he had a "subjective understanding" that he could refuse consent. *Id.* at 230, 243.

Mitchell's other arguments against inferring consent rely on two inapt points: that a consideration of personal characteristics must be part of the consent analysis; and that a person must be aware of a law to consent. Neither is correct.

First, Mitchell suggests that Wisconsin's provision fails because a proper voluntary consent analysis includes consideration of a person's "age, level of education, and intelligence." Pet'r's Br. 25. Inferring consent here requires no such analysis.

In *Schneckloth*, this Court explained that the voluntariness question would consider age and the like, but that was when assessing whether the consent flowed from "duress or coercion." 412 U.S. at 226–27. That has no application to implied consent. The acts that imply consent have nothing to do with a person's age or other personality characteristics. That coercion or duress analysis makes no sense here.[18]

Not only is Wisconsin's statute not coercive under *Schneckloth*, it is not coercive under this Court's implied consent precedent: it does not criminalize a refusal. *Birchfield*, 136 S. Ct. at 2185. Thus, when Mitchell asserts that a "vast majority of state appellate courts" have questioned voluntariness in a way that is relevant here, he is incorrect. Pet'r.'s Br. 20 & n.1. His assertion both misunderstands the state

---

[18] Likewise, police do not need to assess age or level of education for a person to impliedly consent to police walking up to a front door. *See Jardines*, 569 U.S. at 8–9. Rather, it might matter that a person decided to erect multiple "No Trespassing" signs or even a "medieval-style moat" prior to police arrival. *United States v. Carloss*, 818 F.3d 988, 1004 (10th Cir. 2016) (Gorsuch, J., dissenting).

cases and the relevant question.[19] What matters is that this Court requires no knowing on-the-spot waiver but simply forbids coercion. *See Schneckloth*, 412 U.S. at 230, 241, 243. Wisconsin's law is proper under that rubric.

Second, suggesting that it matters to consent, Mitchell contends that it is "highly unlikely" that a "typical person" in Wisconsin would know about the implied consent law. Pet'r's Br. 26.

As an initial matter, Mitchell offers no factual support for his premise. Rather, there is good reason to presume a general knowledge of driving laws. They are the laws that people interact with every day. For example, to lawfully drive on Wisconsin roads, drivers must obtain a license conditioned on an ability to demonstrate knowledge of Wisconsin's traffic laws. *See* Wis. Stat. §§ 343.05(3)(a), 343.07(1g).

---

[19] For example, Mitchell cites pre-*Birchfield* cases addressing voluntariness where states criminalized refusal (*State v. Modlin*, 867 N.W.2d 609, 620 (Neb. 2015); *State v. Yong Shik Won*, 372 P.3d 1065, 1067 (Haw. 2015); *State v. Brooks*, 838 N.W.2d 563, 565 (Minn. 2013)); cases where *state law* imposes a "knowing" requirement (*People v. Arrendondo*, 199 Cal. Rptr. 3d 563, 570, 574 (Cal. Ct. App. 2016), *review granted and opinion superseded*, 371 P.3d 240 (Cal. 2016); *Yong Shik Won*, 372 P.3d at 1080); or other pre-*Birchfield* analyses or cases that turn at least in part on particular state law grounds (*Flonnory v. State*, 109 A. 3d 1060 (Del. 2015); *State v. Butler*, 302 P.3d 609, 613 (Ariz. 2013); *State v. Banks*, 434 P.3d 361, 363 (Or. 2019); *State v. Pettitjohn*, 899 N.W.2d 1, 38 (Iowa 2017)).

More fundamentally, Mitchell's legal assumption is unfounded. It is established that "[e]veryone is presumed to know the law." *United States v. Hodson*, 77 U.S. (1 Wall.) 395, 409 (1870). And, the general presumption of knowing the law makes especially good sense for the traffic laws. He again seems to have in mind intelligent waiver in a trial-rights sense, but that is not the test for implied consent. Pet'r's Br. 23. As explained above, *Schneckloth* supports that "voluntariness" could not be taken "literally to mean a 'knowing' choice"; it does not mandate a "subjective understanding." 412 U.S. at 224, 230.

2. The search of an unconscious impaired driver was valid under the consent exception.

Under Wisconsin law, "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent . . . , and if a law enforcement officer has probable cause to believe that the person [is intoxicated] one or more samples" may be taken. Wis. Stat. § 343.305(3)(b). Wisconsin is in good company: over half of the States have unconscious driver statutory provisions within their implied consent schemes.[20]

---

[20] There are at least 27 states with provisions in force that apply to unconscious drivers. Ala. Code § 32-5-192(b) (2018); Alaska Stat. § 28.35.035(b) (2018); Ark. Code Ann. § 5-65-202(b) (2017); Colo. Rev. Stat. § 42-4-1301.1(8) (2014) (affirmed as constitutional in *People v. Hyde*, 393 P.3d 962, 972 (Colo. 2017)); 21 Del. C. § 2747 (2019); Fla. Stat. § 316.1932(1)(c) (2018) (affirmed as constitutional in *McGraw v. State*, 245 So. 3d 760,

Wisconsin's provision poses no new problem of constitutional concern. By the time the person is unconscious, implied consent is complete. A driver already has impliedly consented to a blood test if a specific circumstance arises: the police have probable cause of impaired driving. It is the same consent that authorizes the conscious driver's search approved by *Neville*, *McNeely*, and *Birchfield*.

Unconsciousness is no boon to a drunk driver's rights. That straightforward point is clear from cases in which this Court has confronted an unconscious motorist. In *Breithaupt v. Abram*, the Court observed that drawing blood from the unconscious intoxicated driver (who had caused a serious crash) did not offend a "sense of justice." 352 U.S at 435 (citing *Rochin v. California*, 342 U.S. 165 (1952)). It was not akin to stomach pumping, and there was nothing "brutal" or

---

770 (Fla. Dist. Ct. App. 2018), *granted and review pending*, No. SC 18-792, 2018 WL 3342880 (Fla. July 9, 2018)); 625 Ill. Comp. Stat. 5/11-501.1(b) (2016); Iowa Code Ann. § 321J.7 (2019); Ky. Rev. Stat. Ann. § 189A.103(2) (2018); La. Rev. Stat. § 32:661(B) (2018); Md. Code Ann., Cts. & Jud. Proc. § 10-305(c) (2018); Minn. Stat. Ann. § 169A.51(6) (2018); Mo. Rev. Stat. § 577.033 (2018); Mont. Code Ann. § 61-8-402(3) (2018); Neb. Rev. Stat. § 60-6,200 (2018); Nev. Rev. Stat. § 484C.160(3) (2017); N.H. Rev. Stat. § 265-A:13 (2018); N.M. Stat. Ann. § 66-8-108 (2019); Ohio Rev. Code § 4511.191(A)(4) (2017–18) (affirmed as constitutional in *State v. Speelman*, 102 N.E.3d 1185 (Ohio Ct. App. 2017), *review pending*); Okla. Stat. Ann. § 751(C) (2018); Or. Rev. Stat. § 813.140(2)(b) (2018); S.C. Code 1976 § 56-5-2950(A) (2018); Utah Code Ann. § 41-6a-522(a) (2018); 23 Vt. Stat. Ann. § 1202(a)(1)2 (2018); W. Va. Code Wyo. Stat. Ann. § 31-6-102(c) (2019).

"offensive" about a trained professional taking a blood sample. *Id.*

The *Breithaupt* Court observed that "the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right." *Id.* at 435. Indeed, "[i]t might be a fair assumption that a driver on the highways in obedience to a policy of the State, would consent to have a blood test made as a part of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony." *Id.* n.2; *see also Schmerber v. California*, 384 U.S. 757, 766–67 (1966) (applying *Breithaupt* in the due process, Fifth Amendment, and Fourth Amendment setting).

Under implied consent, the unconscious intoxicated motorist has already consented. His unconsciousness adds nothing, and the drawing of blood offends no sense of justice. The result here should be the same as for conscious drivers who have not withdrawn their consent.

3. The State is not constitutionally required to afford unconscious drivers the opportunity to withdraw consent.

To avoid that result, Mitchell imagines a new right: to be afforded the opportunity to withdraw consent. Pet'r's Br. 21. There is no such right, and to create one here would mean that unconsciousness

enhances a driver's Fourth Amendment rights. This Court should reject that effort.

Mitchell's view conflates the fact that an individual may withdraw his consent with a nonexistent requirement that one must be afforded that opportunity. For consent to pass muster, it must be "voluntarily given" in the first instance, but it requires no intelligent waiver at the time of the search. *See Schneckloth*, 412 U.S. at 241, 248–49. Consent "may be withdrawn," but that withdrawal must actually be done. *United States v. Sanders*, 424 F.3d 768, 774 (8th Cir. 2005) (discussing *Jimeno*). Otherwise, consent continues and extends to what "would reasonably be understood." *Jimeno*, 500 U.S. at 252.[21]

Thus, when discussing a tenant's consent in *Georgia v. Randolph*, this Court observed that police need not "take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received." 547 U.S. 103, 121–22 (2006). In so holding, the Court adopted reasoning from a prior case where one tenant slept while police

---

[21] A majority of the Wisconsin Supreme Court has declared that there is a constitutional right to be afforded the opportunity to withdraw consent. *State v. Dalton*, 914 N.W.2d 120, 137 (Wis. 2018); J.A. 59 (Bradley, A.W., dissenting) ("one has a constitutional right, not merely a statutory right, to refuse such a search absent a warrant or an applicable exception"). In *Dalton*, that statement was made in the sentencing context; the court ruled that using a refusal at sentencing violated the right to be afforded an opportunity to refuse. Wisconsin believes that holding was in error.

received consent from an apparent co-tenant. *Id.* (citing *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990)).

The concept also plays out in cases like *Jardines*, which addressed police walking a drug-sniffing dog onto a porch and up to a home's front door. 569 U.S. at 3–4. There was no explicit consent; rather, police had no discussion at all with the occupant. *See id.* at 3–5; *see also Jardines v. State*, 73 So. 3d 34, 37–38 (Fla. 2011). That posed no problem for the police (the dogs were another question). This Court explained that implicit consent authorized their approach, with nothing more needed. In particular, the defendant impliedly consented to police approaching his front door because of the "customary invitation" of a "knocker on the front door." *Jardines*, 569 U.S. at 8–9 (citation omitted). That did not require police to wait for a homeowner to come outside to approve before walking onto his property and up to his front door. *See Jardines*, 569 U.S. at 3–8.[22]

In the impaired driving context, this Court's statements further support that there is no constitutional right to be afforded an opportunity to

---

[22] Mitchell attempts to distinguish Wisconsin's law from consent implied through the "customary invitation" in *Jardines*, but that argument is unavailing. While Mitchell asserts that *Jardines* involved no "fine-grained legal knowledge," Pet'r's Br. 28 n.5 (quoting *Jardines*, 569 U.S. at 8), consent implied by impaired driving is no more subtle than consent implied by door-knocker. There is nothing mysterious about the fact that impaired driving is subject to state regulation. Indeed, this Court has cited *Jardines* in the context of *approving of* impaired driving's implied consent. *Birchfield*, 136 S. Ct. at 2185.

withdraw implied consent. In *Neville*, the Court held that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." 459 U.S at 560 n.10. Unlike *Miranda* warnings, where silence "is one of constitutional dimension," the "right to refuse the blood-alcohol test . . . is simply a matter of grace bestowed by the [state] legislature." *Id.* at 565. Mitchell asserts that *Birchfield* held otherwise, Pet'r's Br. 18, but he offers no language from the opinion so holding.

Other courts have recognized that the Constitution does not require police to offer a driver an opportunity to withdraw his consent. *See, e.g., People v. Hyde*, 393 P.3d 962, 966–69 (Colo. 2017) (upholding Colorado's unconscious person implied consent statute to challenge on Fourth Amendment voluntariness grounds, and explaining that the "police need not wait until a drunk driving suspect returns to consciousness").[23]

---

[23] Florida and Ohio appellate courts also have upheld their unconscious person provisions to constitutional challenges post-*Birchfield*. *McGraw*, 245 So. 3d at 769–70; *Speelman*, 102 N.E.3d at 1188.

Mitchell notes some state courts invalidating an unconscious person provision, Pet'r's Br. 44 n.15, but those cases are off point or still pending review. For example, he cites cases turning in part on additional state law requirements (*Arrendondo*, 199 Cal. Rptr. 3d at 570, 574, *review granted and opinion superseded*, 371 P.3d 240 (Cal. 2016); *Commonwealth v. Myers*, 164 A.3d 1162, 1180–81 (Pa. 2018); *Bailey v. State*, 790 S.E.2d 98, 104 (Ga. Ct. App. 2016), *overruled on other grounds by Welbon v. State*, 799 S.E.2d 793 (Ga. 2017)); non-rebuttable presumptions (*State v. Romano*, 800 S.E.2d 644, 652–53 (N.C. 2017); *State v. Dawes*, No. 111310, 2015 WL 5036690 (Kan. Ct. App. Aug. 21,

Beyond being unnecessary, requiring the government to wait until an individual regains consciousness would have the bizarre consequence of favoring drivers who engage in this extremely dangerous behavior. It would reward unconsciousness. Courts rightly have rejected the argument that an unconscious person should have been given time to regain faculties and refuse consent; to do so "would give to the severely intoxicated" "an advantage over the less inebriated." *E.g.*, *Morrow v. State*, 303 A.2d 633, 635 (Del. 1973). That kind of reward is especially inappropriate because the individual, not the government, has created the unconscious condition.

4. The narrow consent inferred is reasonable, especially since the consent flows from the driver's own choices.

"While consent may be an 'independent' ground to justify a search, other indicia of reasonableness have a bearing on [a court's] evaluation of the consent issue." *McGann v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 8 F.3d 1174, 1179 (7th Cir. 1993). "The reason for this is simple: it may be presumed that a person would be less inclined to consent freely to a search having no justification than one that was otherwise well-justified." *Id.* at 1179.

2015) (unpublished)); a concession (*State v. Havatone*, 389 P.3d 1251, 1255 (Ariz. 2017)); or that are still pending review (*State v. Ruiz*, 545 S.W.3d 687 (Tex. App. 2018), *petition granted*; *Arrendondo*, 199 Cal. Rptr. 3d at 570, 574).

Implying consent here is well-justified for three additional reasons: it is narrow; it is narrowed even further by a rebuttable presumption; and the inference sensibly flows from the driver's own choices.

First, Wisconsin's law is narrowly crafted to capture only what is absolutely necessary under the circumstances. It presumes that an unconscious person has not withdrawn his implied consent if—and only if—police have probable cause to believe that he has operated while intoxicated *and* he has rendered himself unconscious without first withdrawing consent. Wis. Stat. § 343.305(3)(b). This simply is not, as Mitchell suggests, inferring consent for "commonplace conduct" such as "walking" or "using a cell phone." Pet'r's Br. 8.

Its aim makes sense. Becoming unconscious is a direct effect of extreme intoxication.[24] The consent continues for one purpose: to gather the only available direct evidence of intoxication. The "less invasive alternative of a breath test" is not available when the driver is unconscious. *Birchfield*, 136 S. Ct. at 2184. The aim also makes sense because the evidence of intoxication dissipates from the bloodstream and, once gone, is lost. For alcohol, its level matters to prosecution and its consequences. *E.g.*, Wis. Stat. §§ 346.63(1)(b), 346.65(2)(g), 343.301(1g)(a)2.b. In

---

[24] *Garriott's Medicolegal Aspects of Alcohol*, 430 (Yale H. Caplan & Bruce A. Goldberger, eds., 6th ed.) (2015) (explaining that "impaired consciousness," "sleep or stupor," "complete unconsciousness," "coma," and "possible death" are all clinical signs and symptoms of high levels of alcohol intoxication).

addition, alcohol is far from the only intoxicant of concern, and blood is necessary to test for drugs.

Second, Wisconsin's law is further narrowed because its presumption is rebuttable. The "person who is unconscious or otherwise not capable of withdrawing consent is *presumed* not to have withdrawn consent." Wis. Stat. § 343.305(3)(b).

A person who has lost consciousness due to intoxication may regain consciousness. *See, e.g.*, Robert J. McManus, *Montana v. Egelhoff: Voluntary Intoxication, Morality, and the Constitution*, 46 Am. U. L. Rev. 1245, 1259 n.79 (1997). That person is free to choose to withdraw his consent prior to a blood draw. Or a person who is not yet unconscious may say or do something that evinces that his consent is rescinded—if, for example, Mitchell had said after his preliminary breath test, "I do not agree to you taking my blood," or had a bracelet stating, "no needles."

Mitchell harbors the misconception that the implied consent law provides "categorical" or "irrevocable" consent. *E.g.*, Pet'r's Br. 3, 32. That is not the case. The statute implies consent in very specific circumstances: where there is probable cause that the person has driven while intoxicated. The person may withdraw his consent. Consequences follow from that withdrawal, but only as appropriate under this Court's precedent.

In contrast, several state-court cases Mitchell cites include discussion of state laws that affirmatively *forbid* or *ignore* withdrawal of consent. *See, e.g., State v. Ryce*, 368 P.3d 342, 347 (Kan. 2016); *State v. Halseth*, 339 P.3d 368, 371 (Idaho 2014); *State v. Villarreal*, 475 S.W.3d 784, 800 (Tex. Crim. App. 2014); *Byars v. State*, 336 P.3d 939, 946 (Nev. 2014); *State v. Fierro*, 853 N.W.2d 235, 242 (S.D. 2014). Pet'r's Br. 20–21 n.1. Unlike the laws in those cases, Wisconsin's law does not forbid or ignore withdrawal of consent.

Third, the law's effect reasonably flows from an unconscious driver's own choices. The driver chose to become intoxicated and then drive, creating these circumstances.

Mitchell often resorts to slippery slope rhetoric, asserting that, under an implied consent theory, States could conduct broad searches of private property following public announcements. Pet'r's Br. 31–32. Mitchell similarly asserts that the unconscious person presumption is unduly broad because it "legislate[s] consent" for those who "cannot make any choice" and because it concerns the "mundane act of driving." Pet'r's Br. 22, 26–27.

Mitchell's views disregard that an individual's choices and actions are the foundation for the consent in the first place. He notes that most Wisconsinites drive to work, suggesting that their privacy interests have been compromised. Pet'r's Br. 26-27. But he miscalculates the value of consent for most drivers.

The vast majority will never have their blood drawn because probable cause of intoxicated driving will never arise. Rather, implied consent protects those who do not drive while impaired but who are at risk, every day, of being injured or killed by those who do. In 2015, an average of one Wisconsinite was killed or injured every 2.9 hours.[25]

More generally, making choices affecting future consent is an accepted concept—for example, it is a concept in healthcare decision-making. Advance healthcare directives recognize that individuals may consent in advance to certain care, and they recognize the continuing validity of such choices if the person cannot make decisions in the future. The Patient Self Determination Act requires healthcare providers to inform patients of their right to accept or refuse medical treatment, *and* of their right to execute an advance directive: choices are made now for when the person later cannot make them due to being "incapacitated." *See* 42 U.S.C. §§ 1395cc(f)(3), 1396a(w)(4); *Winfield v. Mercy Hosp. & Med. Ctr.*, 591 F. App'x 518, 519 (7th Cir. 2015).[26]

---

[25] *Drunk driving crashes, fatalities and injuries*, State of Wis. Dep't of Transp., https://wisconsindot.gov/Pages/safety/education/drunk-drv/ddcrash.aspx (last visited Mar. 25, 2019).

[26] As with implied consent impaired driving laws, all 50 States have statutes recognizing the use of advanced healthcare directives. David Y. Nakashima, *Your Body, Your Choice: How Mandatory Advance Health-Care Directives are Necessary to Protect Your Fundamental Right to Accept or Refuse Medical Treatment*, 27 Harv. L. Rev. 201, 207–09 (2004).

Mitchell himself recognizes this concept. He looks to *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), to explain the problem of discerning the healthcare decision that an incompetent person would make. Pet'r's Br. 23. But he forgets that *Cruzan* saw no problem where the person already had indicated the healthcare he would consent to or refuse. *Cruzan*, 497 U.S. at 284–85. That is the concept in play here, where an unconscious (or otherwise severely intoxicated) driver has consented beforehand to a very limited physical intrusion in the event of probable cause.[27]

If the broad consent-by-choice is acceptable for invasive and fundamental medical care, it should not offend the law to infer a much narrower type of consent to a blood draw for evidentiary reasons.

Having made the choice to drink and drive—to the point of losing consciousness through intoxication or becoming involved in a crash—the impaired driver should reasonably know he may be poked by a needle. An unconscious person suspected of intoxication is likely to have his blood drawn by hospital staff for medical reasons apart from law enforcement's need for evidence. Medical staff will need to determine the nature and extent of intoxication to treat the person. Standard medical care for treatment of an acute unresponsive patient includes that "urine and blood

---

[27] Mitchell asserts that a person cannot consent when unconscious. Pet'r's Br. 23 (citing *Schneckloth*, 412 U.S. at 224). However, he ignores that, under the implied consent law, the person already has consented.

drug screens should be obtained if any toxicity is suspected." S. Arthur Moore & Eelco F. Wijdicks, *The Acutely Comatose Patient: Clinical Approach and Diagnosis*, 33 Seminars in Neurology 110, 116 (2013). Likewise, a "quick, effective direct laboratory-based test for alcohol" is necessary to "assess the severity of effects from alcohol intoxication" for emergency room patients, many of whom are unconscious; "[i]t is recognized that direct blood or serum measurement provides the best all-around test for alcohols." Garriott's, *supra* note 24, at 437, 443.

The unconscious intoxicated driver has chosen to expose himself to the same procedure medically as the police seek to do for public safety. That overlap further supports inferring consent.

* * * *

Consent should not end where, as here, the blood draw is made necessary by the intoxicated driver's own choices. Rather, the Court should continue its tradition of recognizing the validity and utility of the States' implied consent laws. Mitchell's implied consent continued, as it was not withdrawn, and justified the blood draw in this case.

B. The search was reasonably imposed as a condition of driving on public roads to combat the intoxicated operation of motor vehicles.

As stated above, Mitchell's blood draw was valid under the Fourth Amendment because he consented.

Alternatively, this Court could hold that Mitchell's blood draw was a reasonable condition imposed on the privilege of driving to combat intoxicated operation of motor vehicles. The Court has reaffirmed that "[t]he touchstone of the Fourth Amendment is reasonableness." *Jimeno*, 500 U.S. at 250 (citation omitted).

Where it is reasonable, this Court has recognized that a public benefit or privilege may be conditioned on compliance with a search. Mitchell agrees that a balancing test would apply to the question posed here, in that it concerns "evaluating the reasonableness of searches imposed as a condition of accepting certain government benefits." Pet'r's Br. 37. That test states: "whether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995).

For example, the Court authorized random urinalysis drug testing of students as a reasonable condition for those seeking to participate in school athletics programs. *Vernonia Sch. Dist. 47J*, 515 U.S. at 648. Applying the balancing test, it held that the policy was "reasonable and hence constitutional." *Id.* at 665. The Court has applied balancing to uphold warrantless drug testing of Customs Service employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm.

Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 677 (1989). Yet another example of this balancing is found in *Maryland v. King*, 569 U.S. 435, 448 (2013), where the Court applied the test to conclude that taking DNA samples as part of a booking procedure was reasonable under the Fourth Amendment. And the Court has applied the test in the driving context: in *Sitz*, the reasonableness test was applied to sobriety checkpoints. The Court upheld them because the trade-offs "weigh[ed] in favor of the state program." *Sitz*, 496 U.S. at 455 (citation omitted).[28]

The justification is more likely to be present in special, highly-regulated spheres. *Barlow's*, which *Birchfield* cited in the context of consent, also provides guidance in this context. The Court explained that, while there were limits to warrantless inspections, those limits did not apply to areas with a special "history of government oversight" that naturally come with heightened governmental regulation. 436 U.S. at 313. Such heavily-regulated activities include the liquor industry, and *Barlow's* endorsed those warrantless searches. *Id.* (citing *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (warrantless searches in liquor industry); *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless searches in the firearms industry)).

---

[28] There are many other examples of the balancing test in Fourth Amendment jurisprudence. *E.g.*, *Samson v. California*, 547 U.S. 843, 848, 857 (2006) (applying the test to uphold a police officer's suspicionless search of a parolee).

In realms like liquor, the Court observed that, "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Id.* [29] In other words, he has agreed to a limited type of search, which is reasonable given the context and stakes (heavily-regulated intoxicating liquors) and the benefits received (operating in that market).

Of course, intoxicants are not *less* regulated when used on the road. Just the opposite is true. Their use interacts with a second highly-regulated sphere, driving, where everyone knows that the stakes are higher.

"[D]riving on public highways is a privilege." *Winsley v. Cook Cty.*, 563 F.3d 598, 604 (7th Cir. 2009). It is one "subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." *S. Dakota v. Opperman*, 428 U.S. 364, 368 (1976). That is unsurprising. As this Court has long recognized, "[m]otor vehicles are dangerous machines" and "the state may make and enforce regulations reasonab[ly] calculated to promote care on the part of all, residents and nonresidents alike,

---

[29] Mitchell asserts that the closely-regulated-industry cases do not go as far as the State needs the Court to go here, but that is incorrect. Pet'r's Br. 35 n.11. The statutes in those cases provided penalties for refusal, as opposed to allowing inspection "regardless of lack of consent," as Mitchell puts it. Rather than contrast with Wisconsin's implied consent law, that tracks it: if a person withdraws implied consent, police may not proceed based on his consent; rather, a penalty applies.

who use its highways." *Hess v. Pawloski*, 274 U.S. 352, 356 (1927).

Put differently, driving safely is part of a social compact that, when broken, imposes significant costs on others: "the externality imposed on society by drunk driving may be as high as $8,000 for each incident of drunk driving." Miguel F. P. de Figueiredo, *Throw Away the Key or Throw Away the Jail? The Effect of Punishment on Recidivism and Social Cost*, 47 Ariz. St. L.J. 1017, 1043 (2015). Even in 2002 dollars, that was estimated to be "approximately fifty-one billion dollars per year, *excluding* deaths and injuries." *Id.* (emphasis added). It is no wonder that driving, especially impaired driving, is uniquely regulated.

Implied consent impaired driving laws are a special case among special cases, targeting where driving and intoxicants overlap. And the unconscious driver provision is even narrower. To combat intoxicated driving, it is reasonable to condition driving on an officer's ability to direct the taking of a blood draw in the circumstances here.

1. Wisconsin has a compelling interest in obtaining blood evidence from unconscious persons who operated while intoxicated.

One side of the balance looks to the gravity of the government interest. The State's interest here should weigh heavily. Effective enforcement of impaired driving laws is required if the laws are to serve their

key "deterrent" function and also are to "remove[ ] [impaired] drivers from the road." *Mackey v. Montrym*, 443 U.S. 1, 18 (1979).

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Sitz*, 496 U.S. at 451. Thus, in *Sitz*, this Court held that Michigan's sobriety checkpoints—under which passing cars were stopped and drivers examined for signs of intoxication—were reasonable under the Fourth Amendment in large part due to the dangers posed by intoxicated driving.

The statistics show how serious the danger is: in a given year, it takes 10,000 lives or more. *See supra* note 3. Operating while intoxicated causes far more deaths than terrorist attacks of airplanes, but even the limited threat of the latter supports the reasonableness of TSA airport checkpoints. *See, e.g., United States v. Hartwell*, 436 F.3d 174, 179 (3rd Cir. 2006).

Further, drug-impaired driving is on the rise. An opioid epidemic spans the country. Other drugs, like marijuana, add to the dangers. The number of fatally-injured drivers who tested positive for drugs is dramatically on the rise: it rose from 27.8% to 43.6% in the ten years between 2006 and 2016, with drivers testing positive for substances like marijuana, opioids, or both. Put plainly, "[d]runk driving has taken a heavy toll in Wisconsin. Now, drugged driving is gaining a foothold." *See supra* notes 6–8, 13.

Mitchell challenges the subsection applicable to especially dangerous offenders: drivers who are drunk or drugged *and* unconscious. The dangers, and the government interest in public safety, is even more compelling than usual.

Wisconsin is unaware of statistics about impaired drivers that are unconscious when stopped by police, but the problem is very real. It is documented that drunk drivers lose consciousness and, unsurprisingly, those drivers may leave "a path of destruction in [their] wake." Indeed, the drivers being cited for drunk driving are *very* intoxicated. In Wisconsin, for example, the *median* blood alcohol concentration was 0.16%, which is the threshold for "severe impairment." Unsurprisingly, a potential result of being severely impaired is unconsciousness. *See supra* notes 9–11.

An overdose on opioids also causes unconsciousness. Media reports reflect that, unfortunately, driving and overdosing mix on the road. It is not difficult to find this sort of headline: "Unconscious man drives through neighborhood lawns after using heroin"; "Unconscious driver on I-43 overdosed on heroin"; and so on. *See supra* notes 12–14.

In turn, the States' laws need to be enforced effectively both to deter impaired driving and to remove dangerous drivers from the road. And a key part of enforcing the laws effectively is knowing the *level* of intoxication. It is required for prosecuting the

crime of operating a motor vehicle with a prohibited alcohol concentration. Wis. Stat. § 346.63(1)(b). In addition, the severity of the consequences for *any* impaired driving offense depends on the particular level of alcohol concentration. Wis. Stat. § 346.65(2)(g) (pegging fines to levels of intoxication of 0.17, 0.20, or 0.25%). Further, a first-time offender who violates the law with an alcohol concentration of 0.15% or higher is required to have an ignition interlock device installed. Wis. Stat. § 343.301(1g)(a)2.b. And, for restricted controlled substances, a prosecution also requires a blood test to detect their presence. Wis. Stat. § 346.63(1)(am).

The justification for the law is compelling. Those covered are, by any reasonable estimate, among the most dangerous people on the road.

2. The unconscious driver presumption is narrowly tailored and minimally intrusive, especially under the circumstances.

The other side of the balance looks to the intrusion on the individual. Here, it is slight. The unconscious driver provision helps obtain necessary evidence in a narrow situation: it establishes a presumption of non-withdrawal of consent that enables police to obtain the only available direct evidence. It is taken from a person who has engaged in a dangerous version of already dangerous behavior, through the least intrusive available means.

Contrast Wisconsin's narrowly tailored provision to the license-and-registration checkpoint system this Court deemed unreasonable in *Delaware v. Prouse*, 440 U.S. 648, 657, 663 (1979). The Court balanced the "public interest against the individual's Fourth Amendment interests," and concluded that, while states have a vital interest in ensuring that "only those qualified to do so are permitted to operate motor vehicles," "discretionary spot check[s]" without probable cause were not a "sufficiently productive mechanism to justify the intrusion." *Id.* at 657–61.

The narrow scope here contrasts starkly. The unconscious driver presumption applies only where police have probable cause to believe the person operated while intoxicated, only where the person is unconscious or otherwise incapable of withdrawing consent, and only where the person has not previously withdrawn consent.

When it does apply, it adds very little intrusion. A person who drives on public roads and becomes unconscious will need physical assistance from other people, including medical care. Medical personnel likely will draw blood no matter what. Allowing the police also to administer a blood draw adds no novel physical intrusion to what should be reasonably expected.

Indeed, an impaired unconscious driver who requires aid from others is merely being asked to uphold his end of the bargain. Society will provide him with emergency aid but makes a modest demand

to detect his level of intoxication. *See* Donald J. Kochan, *Bubbles (or, Some Reflections on the Basic Laws of Human Relations)*, 26 Fordham Envtl. L. Rev. 133, 161 (2015) (discussing society's "reciprocal relationships").

Not only is the additional intrusion slight, but the unconscious intoxicated driver feels none of it. This factor, too, favors the search's reasonableness.

3. In addition, the blood draw was reasonable because Mitchell's proposed alternative — a warrant — imposes significant burdens while adding nothing meaningful for the suspect.

Mitchell proposes that police should always obtain a warrant absent an exigency. But determining whether an exigency exists requires guesswork; and obtaining a warrant takes time. This Court should reject Mitchell's proposal. It would provide no real benefit to a suspect and would distract police when they need to concentrate most.

Warrants protect privacy in two main ways: (1) they ensure a search is not carried out unless a magistrate determines police have probable cause that evidence will be found, and (2) they delineate the scope of the search. *Birchfield*, 136 S. Ct. at 2181.

This Court observed in *Birchfield* that neither privacy interest would be served by requiring warrants for every test of intoxicated driving. A

magistrate would typically review the "same facts that led the officer to find there was probable cause," written by that officer; a magistrate would be in a "poor position to challenge such characterizations." *Id.* at 2181. And requiring warrants would not help delineate a search's scope "at all"—in every case, the "scope of the warrant would simply be a BAC test." *Id.*

The same holds true for blood draws for unconscious intoxicated motorists.

First, once discerned, probable cause will not be subject to serious doubt. For example, courts have recognized the "wealth of probable cause" stemming from driving while intoxicated, when the driver was nonresponsive and smelled strongly of alcohol. *E.g.*, *State v. Speelman*, 102 N.E.3d at 1189. No magistrate would be in a position to seriously question that.

Offering no factual support, Mitchell supposes that police need more confirmation of probable cause for unconscious than conscious drivers, on the theory that unconscious people cannot perform sobriety tests like walking in a straight line. Pet'r's Br. 44–45. That supposition defies common sense. A driver so intoxicated that he has become unconscious will have the strong indicia of impaired driving: odor, inability to respond (often while in the driver's seat), and evidence of dangerous driving prior to passing out or being involved in a crash. Mitchell himself illustrates that fact. Before he fell unconscious, he was so intoxicated that he needed support to stand, and

officers immediately realized he could not perform sobriety tests. A magistrate would have added nothing to that observation.

Second, the scope of the blood draw always will be the same: simply obtaining blood to test for intoxication. The actual conduct of the search will thus be precisely the same regardless whether obtained via a warrant.

Not only would the warrant serve no demonstrable purpose, but requiring that step would pose risks. Police likely will need time to assess the unconscious driver's state and any injuries to others, and to secure the scene caused by the unconscious driving's "path of destruction." Perhaps that would rise to an exigency, but an officer should not have to guess. Police should be reacting to the scene. Mitchell asserts that obtaining warrants is "routinized," Pet'r's Br. 43, but what he misses is that the unconscious driver situation poses special concerns. It is not, in the sense Mitchell proposes, routine.

That is especially true because medical attention is more likely to be needed for an unconscious person. Even a small amount of time spent on something other than aiding a person could be the difference between life and death. For example, a study in Massachusetts between 2014 and 2016 revealed that 36% of the fentanyl overdose deaths showed evidence of the overdose starting "within seconds to minutes after drug use, and 90% of fentanyl overdose

decedents were pulseless" when emergency medical services arrived.[30]

* * * *

Special circumstances will arise where a privilege or benefit may be conditioned on a properly tailored search. This is one of them. It addresses the intersection of two highly-regulated and risky things: intoxicants and driving. In light of the stakes, the condition imposed is modest: the driving privilege is conditioned on a search for intoxicants if the driver is unconscious and intoxicated. That is reasonable under this Court's Fourth Amendment balancing test.

III. Alternatively, drawing blood from an unconscious impaired driver is reasonable under *Birchfield* as a search incident to arrest.

In *Birchfield*, the facts presented required this Court to resolve whether a blood draw of a conscious person was permissible as a search incident to arrest. The Court said it was not because of the "availability of the less invasive alternative of a breath test." 136 S. Ct. at 2184.

Birchfield did not present the unconscious person scenario that arises here, and so it contains no controlling holding on that point. Rather, this Court

---

[30] Nicolas J. Somerville et al., *Characteristics of Fentanyl Overdose — Massachusetts, 2014–2016*, 66 Morbidity & Mortality Wkly. Rep., 382 (2017), https://www.cdc.gov/mmwr/volumes/66/wr/ mm6614a2.htm.

just commented that, for the unconscious, it had "no reason to believe that such situations are common" and that, "when they arise, the police may apply for a warrant if need be." *Id.* at 2184–85.

Now that the issue truly is at hand, the Court should not follow that dicta. The key reasons that this Court gave for distinguishing a breath test from a blood test for the *conscious* driver would not apply here.

First, this Court's distinction hinged on the "availability of the less invasive alternative of a breath test." *Birchfield*, 136 S. Ct. at 2184. Everyone agrees that alternative is unavailable for an unconscious motorist.

Second, this Court's comment about a warrant relied on an assumption that unconscious driver situations are uncommon. The instances that the State and its amici are aware of, however, suggest that unconscious intoxicated driving occurs far too often. When it occurs, the stakes are high, especially since communities now are struggling with opioid-caused unconscious driving.

Third, the Court's observation that, when people are awake, a blood draw process "is not one they relish" would not apply to the unconscious driver. *Birchfield*, 136 S. Ct. at 2178. An unconscious person will not experience the piercing of his skin in the same way as a conscious person—he will not sense it. And, importantly, the unconscious driver may be subject

to medical procedures, no matter what, since professionals likely will need to take his blood or perform other tests.

There thus is good reason to revisit *Birchfield*'s comment about the unconscious. If this Court were to do so, a balancing test like that discussed above would apply. This Court would balance the "degree to which [blood draws] intrude upon an individual's privacy and . . . the degree to which they are needed for the promotion of legitimate governmental interests." *Id.* at 2176 (citation omitted). As discussed, that kind of inquiry would find a compelling government interest, narrowly tailored, and only a slight increase in intrusiveness, if any.

* * * *

The unconscious intoxicated driver scenario is not as uncommon as one would hope. When it arises, police should be able to act decisively within the narrow confines of the implied consent presumption. That mechanism provides consent that satisfies the Fourth Amendment. Regardless, it is reasonable to search under these circumstances based on the Fourth Amendment's balancing test. Either way reasonableness—present here—should dictate the result.[31]

---

[31] Wisconsin did not violate Mitchell's constitutional protections for the reasons stated here. If this Court were to hold otherwise, it should remand to the state court to determine whether the evidence must be suppressed. *Birchfield*, 136 S. Ct. at 2186, n.9 (citing *Heien v. North Carolina*, 135 S. Ct. 530

CONCLUSION

The judgment of the Wisconsin Supreme Court should be affirmed.

Dated this 27th day of March, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

ANTHONY D. RUSSOMANNO
Counsel of Record
HANNAH S. JURSS
MICHAEL C. SANDERS
Assistant Attorneys General

Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703
(608) 267-2238
russomannoad@doj.state.wi.us
jursshs@doj.state.wi.us
sandersmc@doj.state.wi.us

(2014)); *State v. Houghton*, 868 N.W.2d 143 (Wis. 2015) (adoption of *Heien*).